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CONTROL OF PROPERTY BY THE DEAD. II.*

PURPOSES OPPOSED TO PUBLIC POLICY.

Now, whether the device of a condition or of a trust is employed, it is clear that one has no right to dispose of his property in a manner which is not merely capricious, but which is also positively detrimental to society; which is, in other words, against public policy. The right of the individual to dispose of his property as he likes is subordinate to the right of the community to insist that property shall not be devoted to a purpose inimical to its interests, and that property shall not be used indirectly as an instrument to compel or induce the accomplishment of such a purpose. If an attempt is made to create a trust for such a purpose the trust fails. If a gift is conditioned upon the accomplishment of such a purpose either the gift fails or it is absolute.⁷¹ Now let us consider what purposes are condemned as illegal.

I. In the first place, a disposition is clearly illegal when thereby property is to be used in accomplishing purposes which are criminal. A bequest to trustees for Stevenson's Suicide Club would certainly be illegal. So also is a bequest to trustees "to make seats for poor people to beg in by the highways," when such begging is illegal.⁷² So, too, a provision is illegal if its direct and natural tendency is to induce the commission of criminal acts.

* Continued from the April issue, 65 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 527.

⁷¹ In the case of a devise of land upon an illegal condition, if the condition is precedent, the whole gift is void; if the condition is subsequent, the condition is void and the gift is absolute; as to personalty the courts in England have held that a condition precedent which is illegal as involving *malum prohibitum* is void and that the gift is absolute. Whether the American courts will follow the English decisions and treat conditions precedent as void or will follow the rule as to land and treat the gift as void, is still uncertain, although the tendency is to follow the English doctrine. See Pound, Legacies on Impossible or Illegal Conditions Precedent, 3 Ill. L. Rev. 1, criticizing the English cases.

⁷² Duke, Law of Charitable Uses, 133.

"If lands be given or granted to a man, upon condition that he shall kill a man, or upon condition that he shall burn his neighbor's house, or upon condition that he shall forswear himself, or upon condition that he shall save and keep harmless the grantor whatsoever he shall do, or that if he do not these things [*i. e.*, things contrary to law] the grant shall be void, this condition is void." ⁷³

A bequest to purchase the release of persons committed to prison for non-payment of fines under the game laws is illegal, because it directly tends to encourage a violation of those laws.⁷⁴ The mere fact, however, that a disposition has a slight tendency to induce an unlawful act will not invalidate the disposition. Thus if property is given to one for life with a remainder to another, the latter while awaiting the termination of the life estate might in a moment of impatience feel tempted not to await the course of nature; but the tendency to induce him to commit murder is slight enough to be disregarded.

II. A disposition is illegal if it tends to interfere with a function of the state. A condition divesting the interest of a devisee if he enters into the naval or military service of the country is clearly against public policy.⁷⁵ In England, indeed, a condition divesting a great estate if the devisee should not acquire a peerage has been held by the House of Lords in a famous case to be void as against public policy.⁷⁶ But it is very doubtful whether this case is rightly decided. The judges whose opinions were asked for by the lords were almost unanimously in favor of the validity of the condition, feeling that the tendency to

⁷³ Sheppard's Touchstone, 132. See also Co. Lit. 206a.

⁷⁴ Thrupp v. Collett, 26 Beav. 125.

⁷⁵ *In re Beard* (1908), 1 Ch. 383. In *Habershon v. Vardon*, 4 De G. & Sim. 467, a trust for the political restoration of the Jews to Jerusalem was held invalid as tending to cause a revolution in a friendly country. In *Hutchins v. George*, 44 N. J. Eq. 124, a trust for the purpose of distributing the writings of Henry George was held illegal because in "Progress and Poverty" the writer teaches that "historically, as ethically, private property in land is robbery." Fortunately the decision was overruled in *George v. Braddock*, 45 N. J. Eq. 757.

⁷⁶ *Egerton v. Brownlow*, 4 H. L. C. 1. And so trust to procure a peerage was held invalid. *Kingston v. Pierepont*, 1 Vern. 5. But a condition divesting an estate if the devisee should succeed to a peerage is valid. *Caithness v. Sinclair* (1912), S. C. 79.

induce the employment of improper means in acquiring a title was so slight as to be disregarded. But the lords feared for the dignity of their order.

III. So, too, a disposition will not be upheld if it tends to encourage immorality. It is on this ground that bequests to illegitimate children conceived after the testator's death are held invalid.⁷⁷

IV. So, too, a disposition may be against public policy on the ground that it tends to the disruption of the family. A disposition is illegal if it improperly tends to induce the separation or divorce of husband and wife.⁷⁸ But the rather sweeping and indiscriminating attitude of the earlier law in attempting to keep the family together at all hazards is becoming gradually modified. The law still condemns a breach of conjugal obligations; it still condemns an unjustifiable divorce or separation; and a condition attached to a legacy which clearly tends to induce a divorce without proper cause, or a separation without justification, is illegal.⁷⁹ But a justifiable divorce or separation of husband and wife is not condemned. A testamentary gift to a married woman during such time as her husband should live apart from her is not invalid, when at the time of the making of the will the legatee had already been deserted by her husband, and the purpose of the provision was to provide for her until he should come back to her.⁸⁰ It has been held recently that a condition attached to a legacy that the legacy shall be payable upon the death of the wife of the legatee or upon his divorce or separation from her is not against public policy, for it will be presumed that the testator did not mean an improper divorce or separation.⁸¹

⁷⁷ *Crook v. Hill*, 3 Ch. D. 773; *Godefroi, Trusts* (4th Ed.), 191; *Jarman, Wills*, 1771. It was formerly held that bequests to illegitimate children conceived after the execution of the will, but before the death of the testator, were invalid, but this is not now law. *Occleston v. Fullalove*, L. R. 9 Ch. App. 147; *In the Estate of Frogley*, [1905], P. 137.

⁷⁸ *In re Moore*, 39 Ch. D. 116; 6 Gray, *Cases on Property* (2d Ed.), 6-26.

⁷⁹ *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604.

⁸⁰ *In re Charleton*, 55 Sol. J., 330; *Dusbiber v. Melville*, 178 Mich. 601; *Paider v. Suchy*, 159 N. Y. App. Div. 230.

⁸¹ *Daboll v. Moon*, 88 Conn. 387.

So, too, a disposition of property which tends to induce a parent not to perform his duty to his child is illegal. Thus a provision that property given to a parent is to be forfeited if he lives with his children is clearly invalid. In a bequest to an adoptive parent, a condition that the adoption should be set aside is likewise invalid.⁸² But suppose that the bequest is to the children themselves and not to the parent. In a very recent English case⁸³ the High Court upheld a clause in a will creating a trust for certain infants which provided that no part of the income of the trust fund should be paid or applied for the benefit of any of the infant beneficiaries while in the custody or control of their father, or while he should have anything to do with their education or upbringing.⁸⁴ But in another case a provision in a gift to the testator's grandchildren that they should forfeit their interest if they should live with or be or continue under the guardianship or control of their father was held invalid.⁸⁵ This seems the preferable view; for although the tendency to cause the parent to fail to perform his duty to the children may conceivably not be as strong as where the bequest is to the parent himself, yet it certainly is not so slight as to be disregarded; and, indeed, the desire of the parent to advance the worldly prospects of his children has frequently a more compelling force than his desire to promote his own welfare.

V. It is the policy of the state to encourage the establishment as well as the preservation of the family relationship. Hence a disposition of property may be illegal on the ground of its tendency to restrain marriage. But a disposition the object of which is to provide for a person as long as that person is unmarried is not illegal, although it may offer something of an inducement to remain single.⁸⁶ A disposition of property which

⁸² Anonymous, 80 N. Y. Misc. 10.

⁸³ *In re Borwick's Settlement*, 115 L. T. R. 183.

⁸⁴ Compare *Johnson v. Warren*, 74 Mich. 491; *White's Estate*, 163 Pa. 388.

⁸⁵ *In re Sandbrook* (1912), 2 Ch. 471. See *In re Morgan*, 26 T. L. R. 398; *Witherspoon v. Brokaw*, 85 Mo. App. 169.

⁸⁶ *Jones v. Jones*, 1 Q. B. D. 279; *Harlow v. Bailey*, 189 Mass. 208.

tends to impose only a reasonable restraint is not invalid.⁸⁷ Thus a provision that the estate shall be forfeited on a second marriage, or on marriage under a certain reasonably low age, or on marriage without the consent of a particular person is valid.⁸⁸ So also a provision tending to restrain marriage with a particular person is not invalid. In a recent New York case⁸⁹ it appeared that the testator was determined that his daughter should not marry a particular man, and he provided that she should receive the principal of a trust fund only when the man should die or when she should marry some other man. She contended that the provision was illegal, because it tended to restrain marriage, and also because it tended to encourage her to kill the man. But the court upheld the provision, for the restraint on marriage was reasonable and the tendency to induce murder was slight.⁹⁰ So, too, the courts have upheld provisions tending to restrain marriage with particular classes of persons, as, for example, papists,⁹¹ domestic servants,⁹² Scotchmen,⁹³ persons other than Jews⁹⁴ or Protestants⁹⁵ or Quakers.⁹⁶ Indeed, an Irish court⁹⁷ has upheld a condition divesting an estate on the marriage of the legatee to a person in a "lower social position"; but it is to be hoped that in this country such a condition would be held void for uncertainty. If, however, the scope of the legatee's choice is so limited that there is virtually a prohibition on marriage, the provision is illegal. Thus a provision that a legatee should lose her legacy on her marriage to any one but a Quaker

⁸⁷ 6 Gray, *Cases on Property*, 31 n.; Jarman, *Wills*, (6th Ed.), 1525-1542; Halsbury, *Laws of England*, Vol. 28, tit. Wills, p. 586.

⁸⁸ But for obvious reasons the rule is otherwise where the person would get the property if the beneficiary should marry without his consent. See *Bayeaux v. Bayeaux*, 8 Paige (N. Y.) 333.

⁸⁹ *Matter of Seaman*, 218 N. Y. 77.

⁹⁰ Inasmuch as she engaged the man as her counsel in the case, she certainly showed no sign of a desire to murder him.

⁹¹ *Duggan v. Kelly*, 10 Ir. Eq. 295.

⁹² *Jenner v. Turner*, 16 Ch. D. 188.

⁹³ *Perrin v. Lyon*, 9 East 170.

⁹⁴ *Hodgson v. Halford*, 11 Ch. D. 959.

⁹⁵ *In re Knox's Goods*, Ir. L. R. 23 Ch. D. 542.

⁹⁶ *Haughton v. Haughton*, 1 Moll. 611.

⁹⁷ *Greene v. Kirkwood* (1895), 1 I. R. 130.

was held invalid in a case in which it appeared there were only a half dozen marriageable Quakers within her reach.⁹⁸

VI. In England at one time many dispositions were invalid as tending to encourage "the propagation of a false religion."⁹⁹ Although there have been numerous statutes relaxing the rigor of the law as to Roman Catholics, Protestant Dissenters and Jews,¹⁰⁰ trusts for monastic orders are still illegal in England and in Ireland.¹⁰¹ There are still other remnants of the old law of superstitious uses. In England a bequest for the saying of masses is still held illegal as a superstitious use.¹⁰² But in Ireland¹⁰³ and in this country it is held that there is nothing illegal in such a bequest.¹⁰⁴ In other respects, however, the attitude of the English courts toward religion has become increasingly liberal. In 1850, a legacy to be applied as a prize "for the best original essay on natural theology, treating it as a science, and demonstrating the adequacy and sufficiency of natural theology when so treated and taught to constitute a true, perfect and philosophical system of universal religion" failed on the ground that it was not "consistent with Christianity."¹⁰⁵ This decision was expressly overruled in a recent case, in which the Court of Appeal upheld a legacy to the Secular Society, Ltd., a company the main object of which was "to promote in such ways

⁹⁸ *Maddox v. Maddox's Adm'r*, 11 Gratt. (Va.), 804. As there was no gift over, the court held that the condition even if not invalid operated only *in terrorem*. See also *Story, Eq. Juris.*, Sec. 287.

⁹⁹ *Rex v. Lady Portington*, 1 Salk. 162.

¹⁰⁰ *Tudor, Charities* (4th Ed.), 4-8.

¹⁰¹ *Ellard v. Phelan* (1914), 1 I. R. 76. But a trust for the members of a monastic order is valid. *In re Smith* (1914), 1 Ch. 937. So is a trust for the decoration of its church. *In re Greene* (1914), 1 I. R. 305.

¹⁰² *West v. Shuttleworth*, 2 Myl. & K. 684; *Tudor, Charities* (4th Ed.), 44.

¹⁰³ *Reichenbach v. Quin*, 21 L. R. I. 138; *Attorney-General v. Hall* (1897), 2 I. R. 426; *O'Hanlon v. Logue* (1906), 1 I. R. 247.

¹⁰⁴ See *Hoeffer v. Clogan*, 171 Ill. 462. On the question whether such bequests fail, not on the ground of illegality, but for the want of a definite beneficiary, see *ante*, p. 538.

¹⁰⁵ *Briggs v. Hartley*, 19 L. J. (Ch.), 416. See also *Cowan v. Milbourn*, L. R. 2 Ex. 230, where a contract to let rooms for the delivery of lectures of a similar character was held illegal. In *Thornton v. Howe*, 31 Beav. 14, a trust for "the printing, publishing and propagation of the sacred writings of the late Joanna Southcote" was upheld because her works contained "nothing which could shake the faith of Christians."

as may from time to time be determined, the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action.”¹⁰⁶ It was contended that the purpose of the society was the promotion of atheism and blasphemy. As to this the Master of the Rolls observed that “this is one of the subjects in which there have undoubtedly been great changes of opinion within the last hundred years, and I think within the last half-century. It is really a question of public policy, which varies from time to time.”

The courts generally uphold conditions as to the beneficiary's religious faith. No distinction is taken between the case where the gift is conditioned upon adherence to an old faith and the case where it is conditioned upon a change of faith. The House of Lords has upheld a provision that if a devisee should not be educated in the Protestant religion according to the rites of the Church of England the property should go over to another.¹⁰⁷ A provision divesting the interest of a legatee if she should become a nun is valid.¹⁰⁸ The Court of Appeals of Maryland has upheld a condition that a legatee should withdraw from the Roman Catholic priesthood and from membership in any order or society connected with the Roman Catholic Church or refrain from becoming a priest or forming such a connection.¹⁰⁹ Another court has upheld a condition that the beneficiary be educated in the Roman Catholic faith.¹¹⁰ In another case it was held that a gift may be conditioned upon the donee's attendance upon “the regular meetings of worship of the Emanuel Church near the village of Cashton, Wisconsin, when not sick in bed, or prevented by accident or other unavoidable occur-

¹⁰⁶ *In re Bowman* (1915), 2 Ch. 447. In *Zeisweiss v. James*, 63 Pa. 465, Sharswood, J., expressed the opinion that a legacy to the “Infidel Society in Philadelphia . . . for the purpose of building a hall for the free discussion of religion, politics, etc.” was illegal.

¹⁰⁷ *Clavering v. Ellison*, 7 H. L. C. 707.

¹⁰⁸ *Ex parte Dickson*, 1 Sim. (N. S.), 37.

¹⁰⁹ *Barnum v. Mayor, etc.*, of Baltimore, 62 Md. 275. See *Kenyon v. See*, 94 N. Y. 563.

¹¹⁰ *Magee v. O'Neill*, 19 S. C. 170. Compare *McBride's Estate*, 152 Pa. 192.

rence.”¹¹¹ This condition, it was held, does not violate the constitutional provision that “the right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed.” The only decision the other way is to be found in a Virginia case,¹¹² in which it was held that a condition that a legatee should remain a member of the Society of Friends is against public policy as putting a premium upon “fraud, meanness and hypocrisy,” and as tending “to corrupt the pure principles of religion.” The objection to this view is that it would raise too many and too difficult questions as to its limits; and it is probably wiser to hold, as the courts generally have held, that such conditions, foolish or whimsical as they may be are not beyond the power of the testator to impose.

VII. One very definite limit set by public policy to the power of the testator to control property after his death is the time limit. This policy finds its chief expression in the rule against perpetuities, of which the classic formulation is that of Professor Gray: “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”¹¹³ This rule is intended to prevent a testator from designating the persons who shall enjoy his bounty unto the third and fourth generation of those who come after him. It relates only to the time of vesting of interests and not to the time of their enjoyment, nor to their duration nor to their assignability. It applies to equitable estates as well as to legal estates and to powers of appointment as well as to estates. It is perhaps the most sweeping and the most important limitation on the power to control property after death. But it is questionable whether the period is not too long. The fact that any, and any number of, lives may be selected, makes the possible period more than a century, if the testator is careful to choose a sufficient number of lives of sufficiently youthful persons. In several states, under the leadership of New York, the period has by statute been shortened to two lives in being at the creation

¹¹¹ *In re Paulson's Will*, 127 Wis. 612.

¹¹² *Maddox v. Maddox's Adm'r*, 11 Gratt. (Va.), 804.

¹¹³ Gray, *Rule against Perpetuities* (3d Ed.), Sec. 201.

of the estate.¹¹⁴ The period was found in England to be too long when the income as well as the principal is tied up; and a shorter period for accumulation of income was therefore provided for by the Thellusson Act.¹¹⁵ This statute has been partially adopted in one or two of our states.¹¹⁶

And yet in spite of the rule against perpetuities, a testator has power to create an interest which may not come into possession for centuries. There is no doubt that unless a statute provides otherwise, there is no limit to the possible duration of an estate for years; and inasmuch as the remainder after an estate for years is a vested interest, the rule against perpetuities does not apply to it.¹¹⁷ But undoubtedly long leases are a real evil. In a few states therefore statutes have been passed limiting the duration of terms for years.¹¹⁸ But in most of the states there are no such statutes. There are other situations to which it is held that the rule against perpetuities is not applicable, but which, nevertheless, fall even more clearly within the evil which it is the purpose of that rule to prevent. An estate in fee simple may be created with a provision that on the happening of a certain event the grantor or his heirs may put an end to the estate granted; and the right of entry for breach of such a condition is generally held not to fall within the rule against perpetuities.¹¹⁹ Again, it seems to be held in this country that one may create an estate in fee simple to continue until the happening of a certain event, and that such a determinable fee is valid in spite of the Statute *Quia Emptores*, and, moreover, that the possibility of reverter on the termination of such an estate does not fall within the rule against perpetuities.¹²⁰ Thus a provision in a deed of

¹¹⁴ See Gray, Rule against Perpetuities (3d Ed.), Secs. 747-752.

¹¹⁵ 39 & 40 Geo. III, c. 98 (1800). This statute forbids accumulations for any longer term than the life of the settlor, or twenty-one years from the death of the settlor or testator, or during the minority of any person who under the settlement or will would for the time being, if of full age, be entitled to the income directed to be accumulated.

¹¹⁶ Gray, Rule against Perpetuities (3d Ed.), Secs. 715-727.

¹¹⁷ Gray, Rule against Perpetuities (3d Ed.), Sec. 972.

¹¹⁸ Gray, Rule against Perpetuities (3d Ed.), Sec. 210, n.

¹¹⁹ Gray, Rule against Perpetuities (3d Ed.), Secs. 304-311a. The rule is otherwise in England. *Op. cit.*, Secs. 299-303.

¹²⁰ Gray, Rule against Perpetuities (3d Ed.), Secs. 38-41a, 312.

land to a railroad company that when the company should cease to use the land for a station, the land should revert to the donor or his heirs, has been upheld.¹²¹ But why should the grantor or testator be allowed thus to create an interest which may terminate at a very remote period, and thus to give his (in this country) perhaps innumerable heirs¹²² at some far distant date a right to share his property? Surely such a result is opposed to sound public policy.

There is another situation in which the testator is able to affect the disposition of property long after he is dead. In the case of *In re Tyler*,¹²³ a testator bequeathed property to trustees for a charity and provided that if the trustees should at any time neglect to keep in repair the testator's family vault, the fund bequeathed should pass to the trustees of a different charity. This provision was held to be valid. Of course, no trust was imposed or intended to be imposed on the fund bequeathed or on any other property, but since the fund gave the trustees of the first charity an income much greater than the expense of keeping up the vault, those trustees would surely see to it that, somehow or other, money would be raised to keep the vault in repair and thus enable the charity to retain the fund bequeathed. Now there could be no serious objection to this if the condition were limited in its operation to the period of the rule against perpetuities; but there was no such limitation. The difficulty is in the holding that the rule against perpetuities has no application to a gift over from one charity to another.¹²⁴ Now there seems to be no good reason why the rule against perpetuities should not apply to a gift over from one charity to another.¹²⁵ There is the most evident objection to allowing a gift over in such a case as this, where the testator attempts to use the fear

¹²¹ *Carr v. Georgia R. R.*, 74 Ga. 73. So also where the gift is to a charitable corporation. *First Universalist Society v. Boland*, 155 Mass. 171; *Pond v. Douglass*, 106 Me. 85.

¹²² Neither the right of entry for breach of condition nor the possibility of reverter is assignable. See *Pond v. Douglass*, 106 Me. 85.

¹²³ (1891), 3 Ch. 252.

¹²⁴ *Christ's Hospital v. Grainger*, 1 Mac. & G. 460.

¹²⁵ *Gray, Rule against Perpetuities* (3d Ed.), c. 18, especially Secs. 603f-603h.

of losing the property as a club perpetually impending to compel the perpetual accomplishment of a non-charitable purpose.¹²⁶

VIII. There is another very important class of dispositions of property which are contrary to public policy, on the ground that they take or tend to take property out of commerce. While the owner of property may alienate it or not as he sees fit, there is a policy which limits his power to transfer the property to another and restrain that other from alienating it.¹²⁷ The law, therefore, invalidates a provision made by a testator or donor in giving to another land in fee simple or an absolute interest in personalty, that if the devisee or legatee or donee should attempt to transfer his interest, his interest shall terminate.¹²⁸ The practical effect of such provisions as these if upheld would be to take the property out of commerce; for no one would attempt to alienate if the penalty were loss of the property. So, too, the law invalidates a provision that a fee simple or an absolute interest shall terminate if the devisee or legatee or donee should become bankrupt or if his creditors should attempt

¹²⁶ A gift for a non-charitable purpose where no beneficiary is designated, if allowed at all, is invalid if it may continue for a longer period than lives in being and twenty-one years. A direction for the saying of masses during a period greater than that allowed by the rule against perpetuities is, therefore, held invalid. *Dillon v. Reilly*, 1 R. 10 Eq. 152; *Re Zeagman*, 37 Ont. L. Rep. 536. The result is different where a bequest for masses is held to be a charitable bequest. A direction for the perpetual repair of a tomb or vault is likewise held invalid. *Mussett v. Bingle* (1876), W. N. 170; *Toole v. Hamilton* (1901), 1 I. R. 383; *In re Gay's Estate*, 128 Cal. 552; *Mason v. Bloomington Library Assn.*, 237 Ill. 442; *Morristown Trust Co. v. Mayor*, 82 N. J. Eq. 521; *Godefroi, Trusts* (4th Ed.), 203; *Ames, Cases on Trusts* (2d Ed.), 201, n. 1. Compare *Thomson v. Shakespeare*, 1 DeG. F. & J. 399. The result is different where by statute such bequests are considered as made for a charitable purpose. So, too, a direction that a band should be maintained to play dirges and other appropriate music on the grave of the testator on each recurring anniversary of his death, as well as on holidays and other proper occasions, has been held to be invalid because not limited in its operation to the period allowed by the rule against perpetuities. *Detwiler v. Hartman*, 37 N. J. Eq. 347. Compare *Palethorp's Estate*, 24 Pa. D. R. 215, in which a testator bequeathed \$150,000 on trust to apply the income to the care of his family burial lot and for the employment of a proper person to show people the lot, was held invalid as to the latter provision.

¹²⁷ The law seems to uphold a provision for the forfeiture even of an estate in fee simple or an absolute interest on alienation to certain specified persons (*Gray, Restraints on Alienation* [2d Ed.], Secs. 31-44); but the wisdom of upholding such provisions is doubtful.

¹²⁸ The rule is the same although the restraint is for a limited time. *In re Rosher*, 26 Ch. D. 801.

to attach or levy upon his interest. There is a clear policy against putting the property beyond the reach of creditors. But if the interest given is only a life estate or an estate for years, a provision forfeiting it on alienation, voluntary or involuntary, is upheld. The difference between such provisions as to the fee simple or absolute interest and those as to life estates or estates for years is a difference only of degree, but it is perhaps sufficient to justify the difference in the law,¹²⁹ for such limited interests are not, like absolute interests, usual subjects of commerce.

But, although a testator may thus lawfully provide that on the alienation, voluntary or involuntary, of an interest for life or years, the interest shall be forfeited, yet he cannot actually prevent the alienation of a *legal* interest, whether absolute¹³⁰ or for life or years.¹³¹ In the case of an *equitable* interest, whether absolute or for life or for years, the English view is the same.¹³² But in this country there is a growing tendency to allow restraints on alienation of an equitable life interest.¹³³ But should not equity refuse to allow restraints on the alienation of equitable interests which as to legal interest are forbidden by the law? Should not equity follow the law? Surely it should, if the policy which forbids restraints on alienation of legal interests is applicable to equitable interests. Now obviously to make the property itself inalienable would take the property out of commerce. If an equitable interest in property is made inalienable, the physical property itself is not necessarily taken out of commerce. The trustee who holds the legal title to the property

¹²⁹ Gray, *Restraints on Alienation* (2d Ed.), Secs. 13-30, 78-90; Kales, *Future Interests in Illinois*, Secs. 281-285. It has been held that a provision for forfeiture on alienation of a life annuity is valid. *In re Dempster* (1915), 1 Ch. 795.

¹³⁰ *Jones v. Port Huron Engine Co.*, 171 Ill. 502; *Clark v. Clark*, 99 Md. 356; *Lathrop v. Merrill*, 207 Mass. 6; *Loosing v. Loosing*, 85 Neb. 66.

¹³¹ *Henderson v. Harness*, 176 Ill. 302; *Wool v. Fleetwood*, 136 N. C. 460.

¹³² *Brandon v. Robinson*, 18 Ves. 429.

¹³³ See Ames, *Cases on Trusts* (2d Ed.), 397-400; Gray, *Restraints on Alienation* (2d Ed.), Secs. 134-277a. In some jurisdictions the creditors of the beneficiary are excluded by statute from reaching the whole or a part of his interest. Ames, *Cases on Trusts* (2d Ed.), 401n; *Clark, Spendthrift Trusts in New York*, 9 Bench & Bar, 6, 59, 106; *Perry, Trusts* (6th Ed.), 386, 815a.

may or may not be given a right to sell it and to purchase other property. If he is not given that right, the property itself is taken out of commerce for all practical purposes, even though, except as far as recording acts prevent, he may have the actual power, by a breach of trust, to transfer the property free and clear of the trust. If, on the other hand, the trustee has a right to sell it, the property itself is not taken out of commerce; but the beneficial interest in the property is taken out of commerce. This is not as clearly against public policy as taking the property itself out of commerce. But it seems that it does nevertheless clearly violate a broader policy which forbids all restraints on alienation. To give the "enjoyment of wealth without its responsibilities,"¹³⁴ by artificial means to keep wealth in the hands of the dishonest or the incompetent, would seem opposed to the principles of the sound economist and the wise sociologist. The doctrine is a paternalistic doctrine, as Professor Gray says, but it does not seem to be, as he suggests, a doctrine which, with its tendency to perpetuation of the institution of private property and of a separate plutocratic class, would commend itself to the socialist. But the doctrine which allows these so-called "spend-thrift trusts" is apparently a growing doctrine. Professor Gray's powerful attack upon them has not been so much resisted as ignored.¹³⁵

It seems that in Massachusetts a testator may put an equitable interest beyond the reach of attaching creditors and yet at the same time allow the beneficiary to alienate it.¹³⁶ It may be suggested that to allow a voluntary alienation of an interest in property and at the same time to prevent creditors from reaching that interest is more clearly against public policy than to allow a restraint on all alienation, both voluntary or involuntary. At any rate, even if the testator may exclude attaching creditors and yet may provide that the beneficiary may alienate his interest, the question arises whether he can prevent the trustee in bankruptcy of the beneficiary from reaching the beneficiary's interest

¹³⁴ Gray, *Restraints on Alienation* (2d Ed.), Sec. 168.

¹³⁵ One important exception is *Hutchinson v. Maxwell*, 100 Va. 169.

¹³⁶ *Ames v. Clarke*, 106 Mass. 573, *semble*; *Huntress v. Allen*, 195 Mass. 226, *semble*.

where it is alienable. A negative answer to that question seems easy. The Bankruptcy Act¹³⁷ expressly vests in the trustee all "property which prior to the filing of the petition he could by any means have transferred." That would seem exactly to cover the case. But the Supreme Judicial Court of Massachusetts has recently held that the trustee in bankruptcy cannot reach the beneficial interest even though the beneficiary might have assigned it,¹³⁸ and the Supreme Court of the United States has affirmed this decision.¹³⁹

The Supreme Judicial Court of Massachusetts and the Supreme Court of Illinois have recently gone so far as to uphold restraints upon the alienation of an equitable interest in fee simple or an absolute equitable interest.¹⁴⁰ These cases are opposed to the great weight of authority even in jurisdictions which allow restraints upon equitable life estates. They seem to be an unfortunate extension of the doctrine of spendthrift trusts, though one with which the Massachusetts and the Illinois courts have for some time been flirting.¹⁴¹

At any rate, if restraints on the alienation of equitable interests are to be allowed, a time limit must be put upon the power of the testator to impose such restraints. The rule against perpetuities governs only the time of vesting of estates and therefore does not apply. But, by analogy to that rule, the testator can be prevented from restraining alienation beyond the period allowed by that rule for the vesting of estates.¹⁴²

¹³⁷ Sec. 70a (5).

¹³⁸ *Boston Safe Deposit & Trust Co. v. Luke*, 220 Mass. 484.

¹³⁹ *Eaton v. Boston Trust Co.*, 240 U. S. 427.

¹⁴⁰ *Boston Safe Deposit & Trust Co. v. Collier*, 222 Mass. 390; *Wallace v. Foxwell*, 250 Ill. 616.

¹⁴¹ Chiefly because of a failure to distinguish the doctrine of restraints upon alienation as applied in *Broadway National Bank v. Adams*, 133 Mass. 170, with the doctrine of postponement of enjoyment as applied in *Clafin v. Clafin*, 149 Mass. 19, which is considered hereafter. See *Wagner v. Wagner*, 244 Ill. 101; *Lathrop v. Merrill*, 207 Mass. 6.

¹⁴² In the case of restraints on the alienation of a future estate there is a difference of opinion as to the time when the period should begin to run. Professor Gray urges that it should begin to run on the commencement of the estate. See Gray, *Rule against Perpetuities* (3d Ed.), Sec. 121 ii. Professor Kales urges that the period should begin to run on the death of the testator. 20 Harv. L. Rev. 202.

IX. Now as it is against public policy to prevent the owner of property from alienating it, so also it is against public policy to prevent the owner of property from enjoying it. Thus it is said that "it seems if one grant his land to J. S. on condition that he, being a husbandman, shall not sow his arable land, this condition is void," because it is "against the public good";¹⁴³ and again that "if a feoffment be made of land in fee on condition that the feoffee shall not enjoy the land or shall not take the profits of the land . . . the condition is void as repugnant to the estate."¹⁴⁴ In a well-known case¹⁴⁵ a learned judge thus clearly states the policy here involved:

"The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land (though it be for the public good that land should be cultivated), so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in, and pronounces the condition void, and allows the devisee to enjoy the estate free from the condition."

A similar policy is applicable when a testator directs that his property shall be destroyed or devoted to a purpose which is purely capricious and by which no one is to benefit. In a Scotch case, *M'Caig v. University of Glasgow*,¹⁴⁶ the court held invalid a trust for the purpose of erecting and maintaining forever artistic towers and monuments and statues of the testator and the various members of his family on land devised by the testator. In the course of his opinion, Lord Kyllachy said:¹⁴⁷

"I consider that if it is not unlawful, it ought to be unlawful, to dedicate by testamentary disposition, for all time, or for a length of time, the whole income of a large estate—real and personal—to objects of no utility, private or public, objects which

¹⁴³ Sheppard, Touchstone, 132.

¹⁴⁴ Sheppard, Touchstone, 131.

¹⁴⁵ *Egerton v. Earl Brownlow*, 4 H. L. C. 1, 144, *per* Pollock, C. B.

¹⁴⁶ (1907) S. C. 231.

¹⁴⁷ *Ibid.*, 242.

benefit nobody, and which have no other purpose or use than that of perpetuating at great cost, and in an absurd manner, the idiosyncrasies of an eccentric testator. I doubt much whether a bequest of that character is a lawful exercise of the *testamenti factio*. Indeed, I suppose it would be hardly contended to be so if the purposes, say of the trust here, were to be slightly varied, and the trustees were, for instance, directed to lay the truster's estate waste, and to keep it so; or to turn the income of the estate into money, and throw the money yearly into the sea; or to expend the income in annual or monthly funeral services in the testator's memory; or to expend it in discharging from prominent points upon the estate, salvoes of artillery upon the birthdays of the testator, and his brothers and sisters. Such purposes would hardly, I think, be alleged to be consistent with public policy; and I am by no means satisfied that the purposes which we have here before us are in a better position."

So where a testator devised a house to trustees and directed that the windows and doors should be kept bricked up for twenty years, it was held that the next of kin of the testator could insist on taking and enjoying the house during the twenty years.¹⁴⁸ So, too, in a case in which the testator bequeathed a favorite clock to trustees with directions that it should be kept in repair "so long as they might think it proper and practicable," but not for the benefit of any one, the direction was held invalid.¹⁴⁹ But the law has been liberal to testators in the matter of funeral expenses; and a direction that \$40,000 should be spent to erect a monument to the testator's memory has been upheld.¹⁵⁰

X. We have seen that a testator or grantor of property cannot prevent the devisee, legatee or grantee from alienating it, or from enjoying it. May he validly postpone the enjoyment of it? May he, in bequeathing the entire beneficial interest to a person who is under no disability, validly provide that the principal or even the income should not be paid to the legatee until a certain date, or until the legatee reaches a certain age? Certainly the testator cannot accomplish such a result if he gives the legatee the legal title to the property, for the legatee could use it at once and no one could interpose an objection. And if

¹⁴⁸ *Brown v. Burdett*, 21 Ch. D. 667 (1882), W. N. 134.

¹⁴⁹ *Kelly v. Nichols*, 17 R. I. 306.

¹⁵⁰ *Detwiller v. Hartman*, 37 N. J. Eq. 347.

he creates a trust with such a provision, but the trustee ignores the provision and hands over the property to the beneficiary before the arrival of the time designated, no one can object. But may the beneficiary compel the trustee to hand over the property before the arrival of the time designated?¹⁵¹ The English view is that he cannot.¹⁵² The reason sometimes given is that the restriction is repugnant to the gift. If that means that the disposition is self-contradictory or meaningless, it is not true; the testator's meaning is perfectly clear, and perfectly consistent. But does it mean that the disposition is against public policy? The purpose of a spendthrift trust is the coddling of a person as against himself and as against third persons. The purpose of the postponement of enjoyment is simply the coddling of a person against himself. Should his benefactor be allowed so to coddle him? Mr. Gray felt strongly that he should not, that to allow such a thing is to take a paternalistic attitude no less obnoxious than that which upholds spendthrift trusts. The opposite view, however, as embodied in the leading case of *Clafin v. Clafin*,¹⁵³ has met with some judicial favor. It has been said that the worst that can be said of a disposition of this sort is that it is harmless or unwise; that "the testator's harmless whim ought to be allowed to prevail in the interest of supporting his expressed intention"; and that the fact that it may sometimes be an unwise provision is too trivial a ground to defeat the testator's intention.¹⁵⁴ The argument against this is that there is a policy against upholding a restriction on the enjoyment of property by one who alone has a beneficial interest of any sort in the

¹⁵¹ If there are other persons who have vested or contingent interests in the trust property a beneficiary cannot put an end to the trust by calling for a conveyance of the legal title. *Anderson v. Williams*, 262 Ill. 308; 1 Cornell Law Quarterly 209.

¹⁵² *Saunders v. Vautier*, 4 Beav. 115.

¹⁵³ 149 Mass. 19. See for example the recent cases of *Shelton v. King*, 229 U. S. 90; *Estate of Yates*, 170 Cal. 254. Even in jurisdictions where *Clafin v. Clafin* is law, if circumstances have occurred which the testator presumably did not contemplate, and which make a termination of the trust expedient, the court may order such termination. *Sears v. Choate*, 146 Mass. 395; *Bennett v. Nashville Trust Co.*, 127 Tenn. 126; 46 L. R. A. (N. S.), 43.

¹⁵⁴ *Kales*, Future Interests in Illinois, Sec. 294.

property, when neither the testator nor his heirs nor any one other than the beneficial owner of the property can be in any way benefited by upholding the restriction.¹⁵⁵ If such postponement of enjoyment is permitted, the duration of the postponement must be limited in time. The rule against perpetuities has no application to this situation, for there is no question of vesting of a future estate; but by analogy to that rule, enjoyment should not be allowed to be postponed beyond lives in being and twenty-one years.¹⁵⁶

The doctrine of *Clafin v. Clafin* runs counter to another class of cases. It is held that there is a policy which invalidates an attempt on the part of a testator to determine the form in which the property shall be enjoyed by a legatee or devisee who is given the entire beneficial interest in the property and who is under no disability. Where, for instance, a testator directs that land shall be sold and the proceeds paid to a certain person, that person, if under no disability, may elect to take the land itself.¹⁵⁷ This doctrine has been applied even in Massachusetts, the home of the doctrine of *Clafin v. Clafin*, and has been applied even in a case where a testator has directed that a certain sum should be invested in an annuity, where the question of the form of the property is substantially a question of the time of enjoyment.¹⁵⁸ The Massachusetts court attempts to distinguish *Clafin v. Clafin* on the ground that the beneficiary for whom the annuity was to be bought was to receive the benefit of the whole fund. But that was the situation also in *Clafin v. Clafin*. The court says that since the annuitant might immediately sell his annuity, the purchase would be a nugatory act. But in *Clafin v. Clafin* there was no attempt to restrain alienation, and in most states such a restraint on an absolute interest would be invalid anyway, and therefore the beneficiary might have sold his interest and thus

¹⁵⁵ The incidental benefit to the trustee from the continuation of the trust is, of course, immaterial. He is not a beneficiary. Similarly an agent has no right to insist on the continuance of the agency in order to enable him to earn commissions.

¹⁵⁶ Kales, *Future Interests in Illinois*, Sec. 293.

¹⁵⁷ Ames, *Cases on Trusts* (2d Ed.), 459, n.

¹⁵⁸ *Parker v. Cobe*, 208 Mass. 260. See also *Matter of Cole*, 174 N. Y. App. Div. 534.

rendered nugatory the provisions for postponement of enjoyment. Why should the intention of the testator be disregarded? It is because an absolute gift has been made and neither the testator nor any third person has any interest in the property,¹⁵⁹ because no one has any standing to insist on the carrying out of the wishes of the testator; because it is against public policy to allow limitations on the control of property by one who alone has any interest of any sort, vested or contingent, in that property.

XI. Again, the testator is not allowed unrestricted power to control the machinery of a trust which he has created. *Prima facie*, whatever he authorizes the trustees to do, they are justified in doing, and whatever he directs them to do, they are bound to do, unless all the beneficiaries are under no disability and excuse them from so doing. But this is not always true. A court of equity may sometimes authorize the trustees to depart from the testator's instructions. The trust is created for the beneficiaries, and it is their interests which should be considered. Thus where the testator has directed that the trust property shall be retained in a particular form, the court may authorize a sale and reinvestment.¹⁶⁰ A somewhat similar question is presented when a testator names as trustee a person who is not fit to serve. Of course, if the person named as trustee subsequently becomes unfit to serve, the court may remove him. It is clearly proper also to refuse to allow him to act, or to remove him, if he was unfit at the time of his designation by the testator, but the testator was not aware of his unfitness. In such cases as these such action is in accordance with what would probably have been the wish of the testator. But the courts have gone further. They have sometimes refused to allow a trustee to act, although the ground of his disqualification was known to the testator, who designated

¹⁵⁹ If there is a contingent gift over of the annuity, the annuitant cannot insist on taking the purchase price of the annuity or any part of it. *In re Dempster* (1915), 1 Ch. 795.

¹⁶⁰ *Curtiss v. Brown*, 29 Ill. 201; *Gavin v. Curtin*, 171 Ill. 640. For cases in which the court felt that the beneficiary's interest did not demand a departure from the wishes of the testator, see *Johns v. Johns*, 172 Ill. 472; *Johnson v. Buck*, 220 Ill. 226.

him in spite of that fact. Thus where the trustee was directed to pay to the beneficiary the income of the trust fund and any part of the principal which in the trustee's judgment the beneficiary might require for his support, and the trustee was given the beneficial interest in all that might remain on the death of the beneficiary, it was held that in spite of the testator's wish, the conflict of interest and duty of the trustee was such that he should not be allowed to act.¹⁶¹

Sometimes a testator leaves his property to his executors or trustees and directs that a certain person shall be employed by them as attorney or manager or in some other capacity in the administration of the estate. Frequently he uses words which can be construed, and which the courts are very ready to construe, as precatory and not mandatory, as intended to express a wish, but not to impose a legal obligation. In such cases, of course, the person so designated cannot compel the executors or trustees to employ him.¹⁶² In other cases, although the testator shows a clear intent to impose on his executors or trustees a legal obligation, yet the extent of the duties and of the right to compensation are so indefinite that the intended obligation is void for uncertainty, and so cannot be enforced. But the testator may clearly show an intent to impose a legal obligation and the duties and compensation may be definitely stated, or may be of such a character that they can be made definite by resort to customary usage. Has the designated person a right to compel the trustee to employ him? Is it wise to allow a testator to restrict the exercise of discretion by his executors or trustees in the administration of the estate? It is submitted that to enforce such a provision would be against public policy. The testator should not be allowed thus to fetter the executors or trustees in their administration of the estate and thus to clog the machinery, although he himself has set it in motion. Surely a provision that the person designated

¹⁶¹ *Matter of Townsend*, 73 N. Y. Misc. 481. Compare *In re Norris*, 27 Ch. D. 333.

¹⁶² *Shaw v. Lawless*, 5 Cl. & F. 129 (agent to collect rents); *Finden v. Stephens*, 2 Phil. 142 (manager of estate); *Jewell v. Barnes' Adm'r*, 110 Ky. 329 (business employee); *In re Thistlethwaite*, 104 N. Y. Supp. 264 (attorney).

should be employed, even though he prove dishonest or incompetent, is against public policy. And the same policy, though not so clearly, of course, would seem to forbid taking away from the executors or trustees the power of exercising their own discretion in determining whom they should employ.¹⁶³

XII. Finally, it is held to be contrary to public policy to allow the owner of property to create estates in that property of a kind unknown to the law; he cannot, for instance, create a legal or equitable estate in the grantee or devisee and his heirs *ex parte materna*. He cannot exempt an estate, either legal or equitable, from certain incidents which are attached by law to the estate; he cannot, for instance, exclude the claim of the wife of the grantee to dower.¹⁶⁴ The one great exception to the general rule is that which allows the creation of a married woman's separate equitable estate; but even in the case of such a separate estate the better view is that the creator of the estate cannot exclude the husband's claim to curtesy.¹⁶⁵ He cannot impose on his property new kinds of easements or other burdens unknown to the law.¹⁶⁶ Courts of equity by upholding restrictive covenants have gone further than the courts of law in allowing the imposition of burdens on property.¹⁶⁷ There are limits, however, even in equity; for equity, in enforcing restrictive covenants, follows the analogy of the legal doctrines as to easements.¹⁶⁸ A covenant to do an affirmative act upon land will not

¹⁶³ *Foster v. Elsley*, 19 Ch. D. 518 (solicitor); *In re Ogier*, 101 Cal. 381 (attorney); *Matter of Caldwell*, 188 N. Y. 115, 120 (attorney); *In re Wallach*, 164 N. Y. App. Div. 600 (attorney); *In re Pickett's Will*, 49 Ore. 127 (attorney); *Young v. Alexander*, 84 Tenn. 108 (attorney). But see *contra*, *Williams v. Corbet*, 8 Sim. 349 (auditor of accounts); *Hibbert v. Hibbert*, 3 Meriv. 681 (receiver of property); *Conssett v. Bell*, 1 Y. & C. Ch. 569 (receiver of property). The testator might, however, give a designated person an equitable interest in or charge on the fund for a certain amount, and provide that that sum should be paid whether certain services are performed or not, unless the trustees should request the performance of the services, and the designated person refuse to perform.

¹⁶⁴ This, however, has been changed by statute in England. Dower Act (1883).

¹⁶⁵ Ames, *Cases on Trusts* (2d Ed.), 383, n. 3.

¹⁶⁶ *Ackroyd v. Smith*, 10 C. B. 164 (right of way for purposes not connected with any dominant estate); *Hill v. Tupper*, 2 H. & C. 121 (exclusive right to use and let boats on a canal).

¹⁶⁷ *Tulk v. Moxhay*, 2 Phil. 774.

¹⁶⁸ See the elaborate discussion in *Keppell v. Bailey*, 2 Myl. & K. 517.

bind the land in equity,¹⁶⁹ nor will a covenant which is not for the benefit of other land.¹⁷⁰ Moreover, certain restrictions, although they may be beneficial to some one, are contrary to public policy, as when they tend to produce a monopoly or unduly to restrain trade.¹⁷¹ Indeed in one case¹⁷² the broad rule was laid down that "a restriction on the use of real estate, when it does not appear that either some individual or the public would be benefited by it, would be contrary to public policy and void."¹⁷³

CHARITIES.

To one who is ambitious of exercising by means of a disposition of his property the greatest and most enduring influence on human affairs, charities offer the widest opportunity. By means of a charitable trust a testator can create "an inalienable indestructible interest."¹⁷⁴ There is no beneficiary to enforce the trust except in rare cases,¹⁷⁵ nor to consent to its destruction or to the alienation of the trust property. The heirs or next of kin of the testator have no standing to enforce the trust nor to consent to its destruction or to the alienation of the trust property.¹⁷⁶ The attorney-general may enforce the trust, but he cannot destroy it nor authorize the alienation of the trust prop-

¹⁶⁹ *Haywood v. Brunswick, etc., Society*, 8 Q. B. D. 403; 1 Ames, Cases on Equity Jurisdiction, 176.

¹⁷⁰ *London County Council v. Allen* (1914), 3 K. B. 642.

¹⁷¹ *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Tardy v. Creasy*, 81 Va. 553. Compare, *Whealkate Mining Co. v. Mulari*, 152 Mich. 607. But see, *Hodge v. Sloan*, 107 N. Y. 244; 1 Ames, Cases on Equity Jurisdiction, 184. In the case of *Norcross v. James*, 140 Mass. 188, a grantor conveyed a piece of land on which there was a quarry, and which was bounded by another piece of land belonging to the grantor; and the grantor covenanted for himself and his heirs and assigns that he would not open or work or allow any person to open or work any quarry on this other land. A subsequent grantee of the quarry brought a bill in equity to restrain a grantee of the other land from quarrying stone on that land. The court dismissed the bill.

¹⁷² *Mitchell v. Leavitt*, 30 Conn. 587.

¹⁷³ See also *Barrie v. Smith*, 47 Mich. 130. It is for a similar reason that a court of equity refuses to enforce restrictive covenants when the character of the property has so changed that there would be no substantial benefit to any one in enforcing them.

¹⁷⁴ Gray, *Rule against Perpetuities* (3d Ed.), Sec. 590.

¹⁷⁵ Gray, *Rule against Perpetuities* (3d Ed.), App. A.

¹⁷⁶ *Sanderson v. White*, 18 Pick. (Mass.), 328; *MacKenzie v. Trustees*, 67 N. J. Eq. 652, 677; *Petition of Burnham*, 74 N. H. 492.

erty. A court of equity may, it is true, allow a change in the form of trust property by ordering a sale or re-investment,¹⁷⁷ or, on the partial failure of the purpose of the trust, may apply the doctrine of *cy pres*, or, on its total failure, impose a resulting trust in favor of the heirs or next of kin of the testator.¹⁷⁸ But in this country, because of the constitutional prohibition of the impairment of the obligation of contracts, neither the court nor the legislature has any power to put an end to the trust if it is once legally created and is possible of accomplishment.¹⁷⁹ The practical effect, therefore, of a gift or devise or bequest for a charitable purpose is to make the beneficial interest inalienable and to take it out of commerce. Hundreds of years after the creator of a charitable trust has ceased from his labors, his works may follow him. Undoubtedly there is a possibility of grave abuse in thus allowing the establishment of perpetual charitable foundations.¹⁸⁰ Undoubtedly the courts have sometimes not made sufficient allowance for their growth and development. They have been at times too prone to make nice inquiries as to the precise expression of the thought and wish of the testator and treated that as the sole test of what should be done with his property, long after his death; instead of treating the thought and wish of the testator as a starting point and considering the natural development of his charitable purpose in the light of changed and changing conditions. If a purpose is fit to be classed as a charitable purpose, if it is fit to endure indefinitely, it surely must be capable of growth and adaptation to new circumstances. But while we incline to be rigid on the judicial aspects of charities, we are lax on the administrative side. In England the charity commissioners are charged with the oversight of the

¹⁷⁷ *Stanley v. Colt*, 5 Wall. (U. S.) 119; *Old South Society v. Crocker*, 119 Mass. 1, 26; 2 *Perry, Trusts* (6th Ed.), Sec. 737. Compare *Female Orphan Asylum v. Y. M. C. A.*, 119 La. 278. In England a sale or exchange of property may be made with the consent of the charity commissioners. *Lewin, Trusts* (12th Ed.), 634.

¹⁷⁸ *Gray, Rule against Perpetuities* (3d Ed.), Sec. 603i.

¹⁷⁹ *Gray, Rule against Perpetuities* (3d Ed.), Sec. 590, n. See *Crawford v. Nies*, 220 Mass. 61, 224 Mass. 474.

¹⁸⁰ Congress for this reason refused to allow the creation of a Federal corporation to administer Mr. Rockefeller's millions.

administration of charitable foundations. Parliament has been watchful to prevent fraudulent imposition on persons charitably inclined.¹⁸¹ In the United States there is generally no supervision at all. The attorney-general does not act until some one happens to set him in motion. A vast amount of wealth is now administered in a haphazard way by charitable corporations or trustees who are practically not responsible to any one.

Testators sometimes exhibit caprice and sometimes even spite in the creation of charitable foundations. The generous Girard in founding his college provided that no "ecclesiastic, missionary or minister of any sect whatsoever" should ever hold or exercise any station or duty in the college, or be admitted even as a visitor within the premises; and this provision was upheld.¹⁸² But there are limits to the effect that will be given to the caprice of the founder. In a bequest for the establishment of a public school a testator directed that for a term of one hundred years the descendants of nine designated persons should be excluded from the school. This direction was held invalid as opposed to public policy, though the other provision as to the establishment of the school were upheld.¹⁸³ It is peculiarly essential in the case of charitable trusts, which may endure forever, that the founder's caprice should not be given too free a rein. Dispositions, though for educational or religious or public purposes, or for the relief of the poor, which are altogether whimsical or capricious, should not be regarded as charitable dispositions. And if the general purpose of the testator is such as to be called charitable, yet capricious or whimsical provisions as to the carrying out of the charitable purpose should not be allowed to stand. The courts may do much to curb the testator's whims in the case of charitable trusts which they cannot do in the case of strictly private trusts.

Testators perhaps of small means but charitably inclined who are anxious to make their property go a long way sometimes provide that the sum bequeathed by them shall be invested and

¹⁸¹ See War Charities Act (1916), 6 & 7 Geo. V, c. 43.

¹⁸² *Vidal v. Girard's Executors*, 2 How. (U. S.), 127, 197.

¹⁸³ *Nourse v. Merriam*, 8 Cush. (Mass.) 11.

that the income shall accumulate for a certain time or until it reaches a certain sum, and that the original fund and the accumulations shall then be used for a designated charitable purpose. The House of Lords has held that such a direction for accumulation is invalid and that the income is immediately available for the purposes of the charity.¹⁸⁴ The reason for its invalidity is the same as that which forbids postponement of enjoyment in the case of a trust for an individual. In jurisdictions where the doctrine of *Claffin v. Claffin* is recognized, such a direction is held to be not necessarily invalid, even though the accumulation is to last longer than the period of the rule against perpetuities. And yet even in these jurisdictions the evil of postponing the enjoyment of property for too long a time is recognized, and it is held that in each particular case it must be determined whether, under all the circumstances, the provision for accumulation is so unwise as to be opposed to public policy.¹⁸⁵

In speaking of bequests for charitable purposes, Lord Campbell once uttered these words of warning:

"A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed *in saecula saeculorum* when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which I think, ought by human law to be strictly watched and regulated."¹⁸⁶

SUMMARY.

In no branch of our law has its individualistic character been more strikingly exhibited than in that relating to testamentary disposition. The right of the owner of property to dispose of it as he chooses has long been strongly emphasized.

¹⁸⁴ *Wharton v. Masterman* (1895), A. C. 186.

¹⁸⁵ *Brigham v. Peter Bent Brigham Hospital*, 134 Fed. 513; *Girard Trust Co. v. Russell*, 179 Fed. 446; *Woodruff v. Marsh*, 63 Conn. 125; *St. Paul's Church v. Attorney-General*, 164 Mass. 188; *Ripley v. Brown*, 218 Mass. 33; *Collector of Taxes v. Oldfield*, 219 Mass. 374; *Oldfield v. Attorney-General*, 219 Mass. 378; *Gray, Rule against Perpetuities* (3d Ed.), Sec. 679a.

¹⁸⁶ *Jeffries v. Alexander*, 8 H. L. C. 594, 648.

Cujus est dare, ejus est disponere, is a maxim which has often fallen from the lips of the judges. The possession and control of property gives a man a mighty instrument for influencing for good or ill the world about him. A man should never be allowed to wield that instrument without control. But if in an uncontrolled right of private ownership there lurk many dangers threatening the welfare of society, much more do such dangers lurk in an uncontrolled power of testamentary disposition. It is bad enough when the power conferred by the possession of property is exercised by a living man who is wicked or foolish; it is worse if it is exercised by the wicked or foolish dead; the living are at least open to the influence of the world about them; the dead are beyond our reach. Great as has been the freedom of testamentary disposition allowed by our law, public policy has always set limits to it; to set such limits is not opposed to the spirit of our law. Public policy may be an unruly horse,¹⁸⁷ but it is one the judges have to ride. The fact that it is difficult to draw the line between dispositions which are merely unwise and those which are opposed to public policy does not excuse the courts from attempting to draw the line. We have seen that a disposition is opposed to public policy and therefore illegal when it tends to cause the commission of crimes; when it tends to interfere with the functions of the state; when it tends to promote immorality; when it tends to cause the disruption of families or to prevent the establishment of the family relationship; when it attempts to tie up property for too long a time; when it attempts to render property inalienable; when it attempts to separate from the absolute ownership of property the right to enjoy it, and to enjoy it at once; when it attempts too minutely and unwisely to regulate the details of the management of property; and when it attempts to attach to property new and strange incidents. In these various cases the attempted disposition is against public policy either, first, because the property is used as an instrument to compel or induce the doing of acts which are in themselves against public policy, or, second, because posterity is deprived of the benefit of the property. It is clearly against

¹⁸⁷ *Richardson v. Mellish*, 2 Bing. 229, 252.

public policy to allow property to be used as a club to compel or induce the doing of acts which are against public policy. It is also clearly against public policy to allow the owner of property at the moment that he looses his hold upon it to make provisions which will deprive the world of the benefit of that property; while he still owns the property he may use it as foolishly as he likes, provided he does not interfere with the rights of other persons; he may if he chooses sow his land with salt; it is thought that self-interest will act as a sufficient curb to restrain an owner from doing such things; but there is no such curb when he disposes of his property; and here the law must step in and prevent him from depriving others of the benefits of ownership.

(Concluded.)

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